

NOTE

“If You Have a Zero-Tolerance Policy, Why Aren’t You Doing Anything?”: Using the Uniform Code of Military Justice to Combat Human Trafficking Abroad

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ABSTRACT

Human trafficking is a long-recognized problem with global implications. Officially, the U.S. Government has a “zero-tolerance” policy for human trafficking. To that end, the United States has enacted a variety of legislation since 2000 to combat human trafficking both at home and abroad. The over 600,000 individuals who are trafficked each year, however, are evidence that these laws are insufficient. Specifically, the current legal framework leaves significant jurisdictional, evidentiary, and motivational hurdles when it comes to applying that framework to crimes committed by civilian contractors abroad.

In 2007, article 2(a)(10) of the Uniform Code of Military Justice (“UCMJ”) was amended to explicitly provide courts-martial jurisdiction over all civilian personnel accompanying troops abroad in support of a Depart-

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ment of Defense mission, whether that mission is war or a contingency operation. Congress should further amend the UCMJ's punitive articles to reach conduct that might otherwise fall through the gaps in existing antitrafficking laws. This Note sets out a proposed punitive article that, by operating concurrently with existing federal law, gives true effect to the U.S. Government's zero-tolerance policy.

TABLE OF CONTENTS

INTRODUCTION	1256
I. FACTUAL BACKGROUND	1260
II. THE CURRENT LEGAL LANDSCAPE	1263
A. <i>The Trafficking Victims Protection Act</i>	1264
B. <i>The Military Extraterritorial Jurisdiction Act</i>	1267
C. <i>The Uniform Code of Military Justice</i>	1270
1. Article 2(a)(10) and Jurisdiction over Contractors	1272
2. Patronizing a Prostitute and Pandering	1274
III. FILLING THE GAPS: A MILITARY JUSTICE SOLUTION ...	1275
A. <i>Countering the Evidentiary and Motivational Hurdles</i>	1275
B. <i>The Proposed Punitive Article</i>	1277
1. The Proposed UCMJ Amendment	1278
2. The Gaps Are Filled: Application of the Proposed Article	1283
IV. UNSATISFACTORY ALTERNATIVES: INTERNATIONAL LAW AND THE STATUS QUO	1283
A. <i>Arguments for an Alternative Venue: Reliance on International or Host Country Prosecution</i>	1284
B. <i>Arguments Against Amending the UCMJ</i>	1285
CONCLUSION	1286
APPENDIX A: PROPOSED AMENDMENT	1287
APPENDIX B: PROPOSED EXECUTIVE ORDER	1289

INTRODUCTION

To understand how gaps in U.S. human trafficking¹ laws are rendering our policies ineffective, consider the following two scenarios.

¹ Very generally, the term “human trafficking” describes the “activities involved when one person obtains or holds another person in compelled service.” OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, 2011 TRAFFICKING IN PERSONS REP. 7 [hereinafter 2011 TRAFFICKING IN PERSONS REP.]. Legally, the definition of human trafficking is complex and, in many ways, inadequate to combat the problem effectively. See *infra* Part II.

Faye is from China.² At the suggestion of a friend, she went to Afghanistan to find work.³ Because she did not have money for a passport or travel documents, her friend introduced her to a man who made all the necessary arrangements.⁴ She was told she would owe the man \$1500 for his services when she arrived in Afghanistan.⁵ Upon her arrival, Faye soon started working as a waitress in a Chinese restaurant in Kabul.⁶ A few weeks later, the restaurant's owner told her that she owed an additional \$800 for a visa extension and would have to start having sex with the customers to pay the debt.⁷ He would call the police and have her arrested if she refused.⁸ After Afghan police raided the restaurant, Faye was interviewed by the International Organization for Migration ("IOM") and admitted that the restaurant was a front for a brothel.⁹

After the raid, Faye was voluntarily repatriated to China with IOM's help.¹⁰ A series of such raids freed ninety Chinese women from similar brothels.¹¹ Most of their clients were western men working for the security firms, companies, and aid groups that poured into Afghanistan following the 2001 U.S.-led invasion.¹² A whistleblower within one of these contracting companies alleged that one of his co-workers regularly bragged about owning women in Kabul brothels.¹³ Despite the U.S. Government's stated zero-tolerance policy on human

² Faye's story is told in the IOM's field report on trafficking in Afghanistan. INT'L ORG. FOR MIGRATION, *TRAFFICKING IN PERSONS IN AFGHANISTAN: FIELD SURVEY REPORT 37-38* (2008).

³ *Id.* at 37.

⁴ *Id.*

⁵ *Id.* at 37-38.

⁶ *Id.* at 38.

⁷ *Id.*

⁸ *Id.* This would not have been an idle threat. Following the brothel raid, Afghan officials denied the women's claims that they were victims of trafficking. General Paktiawal, head of Kabul's criminal investigations, was quoted as saying: "They come here of their own will. They want to do business here. Police caught them red-handed." Alisa Tang, *Chinese Prostitutes Imported to Afghanistan*, USA TODAY (June 14, 2008, 12:18 PM), http://www.usatoday.com/news/world/2008-06-14-2605427433_x.htm (stating that prostitution in Afghanistan is blamed on "immoral" Chinese women and western men.).

⁹ *Id.*

¹⁰ INT'L ORG. FOR MIGRATION, *supra* note 2, at 38.

¹¹ Nick Schwellenbach & Carol D. Leonnig, *Despite Allegations, No Prosecutions for War Zone Sex Trafficking*, iWATCH NEWS (July 17, 2010, 9:03 PM), <http://www.iwatchnews.org/2010/07/17/2609/despite-allegations-no-prosecutions-war-zone-sex-trafficking>.

¹² *See* Tang, *supra* note 8.

¹³ Schwellenbach & Leonnig, *supra* note 11.

trafficking,¹⁴ neither the State Department nor the Federal Bureau of Investigation (“FBI”) took action.¹⁵ No one was ever prosecuted.¹⁶

Vinnie is from Fiji.¹⁷ She was recruited for what she was told would be a high-paying beautician job at a luxury hotel in Dubai.¹⁸ Despite these promises, however, Vinnie was transported to Iraq for a low-paying position.¹⁹ She was brought to work in a hair salon for an Army and Air Force Exchange Service (“AAFES”) subcontractor at an American military base near Balad, Iraq, in extremely poor living and working conditions.²⁰ Among other things, Vinnie earned a fraction of the pay she was promised when recruited in Fiji. Her contract stipulated twelve-hour workdays, seven days a week, and her “vacation” was “a [r]eturn ticket after completion of the service.”²¹ One of Vinnie’s coworkers was repeatedly sexually assaulted by her supervisor, but complaints to both the Army and AAFES went unanswered.²² After an American journalist interviewed the women, both the Army’s Inspector General (“IG”) and its Criminal Investigation Command (“CID”) investigated the allegations.²³ Again, no one was ever

¹⁴ In 2002, President George W. Bush issued a National Security Presidential Directive mandating a “zero-tolerance” policy toward trafficking in persons. WHITE HOUSE, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE-22 66 (Dec. 16, 2002), available at <http://www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf>. In addition, the U.S. Department of Defense (“DOD”) issued DOD Instruction 2200.01 to deter DOD personnel from engaging in activities that may create a demand for human trafficking, such as hiring foreign prostitutes. DEP’T OF DEF., INSTRUCTION NUMBER 2200.01, COMBATING TRAFFICKING IN PERSONS (Feb. 16, 2007), available at <http://ctip.defense.gov/docs/TIP%20DODI%20220001p.pdf>.

¹⁵ See Schwellenbach & Leonnig, *supra* note 11.

¹⁶ *Id.*

¹⁷ Vinnie’s story was reported by Sarah Stillman in a piece for *The New Yorker*. Sarah Stillman, *The Invisible Army*, NEW YORKER, June 6, 2011, at 56.

¹⁸ *Id.*

¹⁹ *Id.* at 59.

²⁰ *Id.* In 2006, DOD conducted an investigation into the living conditions of subcontractors, which uncovered “widespread abuses, including illegal confiscation of workers’ passports, deceptive hiring practices, excessive recruiting fees, and substandard worker living conditions.” *Id.* at 61 (internal quotation marks omitted).

²¹ *Id.* at 59 (internal quotation marks omitted).

²² Stillman reports that she personally called the Army’s sexual-assault hotline following an alleged rape of a worker by a supervisor. *Id.* at 61. Not only was the phone never answered, but her repeated calls were never returned. *Id.*

²³ Schwellenbach & Leonnig, *supra* note 11; Nick Schwellenbach, *FOIA Friday: Inside Look at Formation of Gov’t Response to Press Inquiry About Human Trafficking*, PROJECT ON GOV’T OVERSIGHT (June 3, 2011, 3:27 PM), <http://pogoblog.typepad.com/pogo/2011/06/foia-friday-inside-look-at-formation-of-govt-response-to-press-inquiry-about-human-trafficking.html>.

charged.²⁴ Eventually, after complaints that she was “making trouble” on the base, Vinnie was allowed to return to Fiji.²⁵

Faye and Vinnie are not alone. The U.S. State Department estimates that between 600,000 and 800,000 individuals are trafficked each year.²⁶ Of these, eighty percent are female, the majority of whom are trafficked for commercial sexual exploitation.²⁷

As the State Department’s numbers show, human trafficking is a large-scale problem with global implications.²⁸ Officially, the U.S. Government has a “zero-tolerance” policy on human trafficking, which was first articulated by President George W. Bush in 2002²⁹ and recently reaffirmed by President Barack Obama.³⁰ To that end, Congress has enacted several different federal laws since 2000 to support efforts to combat human trafficking both at home and abroad.³¹ Although these laws represent laudable efforts, the current legal framework creates significant jurisdictional and motivational hurdles when it comes to applying that framework to crimes committed by civilian contractors abroad.

In 2007, Congress amended article 2(a)(10) of the Uniform Code of Military Justice (“UCMJ”)³² to explicitly provide courts-martial jurisdiction over all civilian personnel accompanying troops abroad in support of a Department of Defense (“DOD”) mission, whether that mission is a declared war or a contingency operation.³³ This amendment provides a unique opportunity to fill the jurisdictional and en-

²⁴ Though the claims of abuse were held to be “unsubstantiated,” Stillman points out that CID never interviewed Vinnie or the alleged victim of the sexual assault. Stillman, *supra* note 17, at 63. Interestingly, though the IG determined that the evidence did not substantiate human-trafficking claims, Vinnie’s story has been included in a classified Army IG training packet obtained by The Project on Government Oversight through a Freedom of Information Act request. Schwellenbach, *supra* note 23.

²⁵ Stillman, *supra* note 17, at 63.

²⁶ OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, 2006 TRAFFICKING IN PERSONS REP. 6.

²⁷ *Id.*

²⁸ *See id.*

²⁹ President Bush declared a zero-tolerance policy on involvement in human trafficking by federal employees and contractors in a National Security Presidential Directive he signed in December 2002. NAT’L SECURITY PRESIDENTIAL DIRECTIVE-22, *supra* note 14, at 63, 66. He noted that the policy was “abolitionist” in nature and would require vigorous enforcement of the law. *Id.* at 64.

³⁰ President Obama declared January 2010 as “National Slavery and Human Trafficking Prevention Month,” in recognition of the need for global cooperation in ending trafficking. *See* Proclamation No. 8471, 75 Fed. Reg. 1267 (Jan. 4, 2010).

³¹ *See infra* Part II for a discussion of the current legislative framework.

³² Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801–947 (2006).

³³ *See infra* Part II.C for a discussion of this amendment.

forcement gaps in existing antitrafficking laws. To take advantage of this opportunity, Congress should amend the UCMJ punitive articles to include language prohibiting any form of human trafficking. Under the grant of concurrent jurisdiction in UCMJ article 2(a)(10), this new antitrafficking punitive article could then be used to prosecute private military contractors who engage in human trafficking while accompanying troops in areas of declared war or contingency operations.

This Note proposes an amendment to the UCMJ designed to put prosecutorial emphasis on human trafficking rather than sex or prostitution. Part I provides an overview of the connection between civilian contractors and human trafficking abroad. Part II discusses the current status of antitrafficking laws in the United States and highlights areas of weakness that make prosecution of human trafficking offenses by civilian contractors difficult. This Part further discusses various federal laws that have been enacted to reach trafficking offenses committed by civilians accompanying the Armed Forces, as well as the grant of jurisdiction in article 2(a)(10) and the inadequacies inherent in the military-specific antiprostitution punitive articles in the UCMJ. Part III explains why a military justice solution is the best method for filling the gaps in the existing legal framework and why the UCMJ should be amended to explicitly make human trafficking an offense. It further sets out, in depth, the proposed language for the new punitive article. Part IV responds to likely counterarguments to this proposal, arguing that reliance on international or host-nation laws would be ineffective to combat human trafficking offenses committed by civilian contractors abroad. Finally, this Note concludes by explaining why the application of an antitrafficking amendment to the UCMJ to civilian contractors abroad is the only way to obtain justice for women like Faye and Vinnie.

I. FACTUAL BACKGROUND

War and conflict are two factors that increase the vulnerability of an area to human trafficking.³⁴ In fact, commentators, including current Liberian President Ellen Johnson Sirleaf, have suggested that trafficking and conflict are inextricably linked.³⁵ Indeed, the U.S. Government has candidly acknowledged that military and contractor

³⁴ See ELISABETH REHN & ELLEN JOHNSON SIRLEAF, WOMEN, WAR AND PEACE: THE INDEPENDENT EXPERTS' ASSESSMENT ON THE IMPACT OF ARMED CONFLICT ON WOMEN AND WOMEN'S ROLE IN PEACE-BUILDING 12 (2002), available at http://www.unifem.org/attachments/products/213_chapter01.pdf.

³⁵ *Id.*

deployments contribute to the problem of human trafficking.³⁶ As scholars of armed conflict and political violence have noted, troops frequently feed a demand for prostitution, and prostitutes often include victims of trafficking.³⁷ Troops, however, are not the only actors who engage, either directly or indirectly, in human trafficking. For example, in Bosnia in the late 1990s, investigations revealed that a number of civilian contractors to the U.S. military purchased women and young girls from local brothels.³⁸

The rise of civilian contractors within the American military framework is rooted in the period following the end of the Cold War, when the government turned increasingly to contracts with private companies to fill a void left by the reduction in the general size of the U.S. Armed Forces.³⁹ The trend of augmenting American military troops with civilian contractors began in earnest in 1992, when the U.S. Government used its newly implemented Logistics Civil Augmentation Program (“LOGCAP”) to put logistical support for all prospective operations in the hands of a single prime contractor, originally Brown & Root Services (the precursor to Kellogg Brown & Root (“KBR”)).⁴⁰ Since then, the role of civilian contractors has greatly expanded to include not only logistical support, but also operational support of weapons systems, training, and security.⁴¹ In 2007,

³⁶ See *Enforcing U.S. Policies Against Trafficking in Persons: How Is the U.S. Military Doing?: Hearing Before the Comm’n on Sec. and Cooperation in Eur. and the H. Armed Servs. Comm.*, 108th Cong. 7 (2004) [hereinafter *Hearings*] (testimony of Ambassador John R. Miller, Director, Office to Monitor and Combat Trafficking in Persons, U.S. Department of State); see also 2011 *TRAFFICKING IN PERSONS REP.*, *supra* note 1, at 377.

³⁷ Sally Cameron & Edward Newman, *Trafficking in Humans: Structural Factors*, in *TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS* 49 (Sally Cameron & Edward Newman eds., 2008).

³⁸ Robert Capps, *Outside the Law*, SALON (June 26, 2002, 6:00 PM), http://www.salon.com/2002/06/26/bosnia_4/singleton.

³⁹ P.W. Singer, *Outsourcing War*, FOREIGN AFFAIRS (Mar./Apr. 2005), <http://www.foreignaffairs.com/articles/60627/p-w-singer/outsourcing-war>. After the first Gulf War, DOD underwent drastic cuts in spending and manpower, ultimately reducing the size of the Armed Forces by thirty percent. See Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 374 (2004) (citing Max Boot, *Korean Crisis Reveals U.S. War Flaws*, USA TODAY, Jan. 8, 2003, at A13).

⁴⁰ JAMES JAY CARAFANO, *PRIVATE SECTOR, PUBLIC WARS: CONTRACTORS IN COMBAT—AFGHANISTAN, IRAQ, AND FUTURE CONFLICTS* 44 (2008). Brown & Root Services accompanied the military incursions into Somalia in 1992, Haiti in 1994, and Bosnia in 1995, before losing the LOGCAP contract to DynCorp in 1997. *Id.* at 46. LOGCAP contracts continue to be the system by which U.S. combat capabilities are supported. *Id.* at 45–46.

⁴¹ See DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* 1 (2005).

there were over 100,000 civilian contractors in Iraq,⁴² and the military recently estimated that 104,100 such contractors are in Afghanistan.⁴³ Given the sheer number of these individuals serving the U.S. Government abroad, the primary question becomes how to prosecute human trafficking offenses when committed by these civilian contractors.⁴⁴

This problem is not a theoretical one. The most infamous instance of human trafficking by a civilian contractor—and corresponding failure to prosecute by the government—occurred in the late 1990s. An investigation revealed that DynCorp employees, under the U.S. Army's LOGCAP contract to provide logistical support to the peacekeeping efforts in Bosnia, purchased women and girls as young as twelve from local brothels.⁴⁵ Although several DynCorp employees were fired, none were ever prosecuted because both Bosnia and the United States lacked jurisdiction over the men involved.⁴⁶

This problem continues today. For example, recent allegations have come to light that suggest civilian contractors working in support of the U.S. Government in Iraq and Afghanistan have engaged in human trafficking activities.⁴⁷ In December 2008, U.S. military personnel discovered that a warehouse operated by a KBR subcontractor, Najlaa International Catering, contained more than a thousand workers who appeared to be victims of human trafficking.⁴⁸ Despite an investigation that revealed conditions described by one KBR official as a “corporate embarrassment,”⁴⁹ Najlaa retained its service contracts and won a new multimillion-dollar deal for operating a dining

⁴² CARAFANO, *supra* note 40, at 11.

⁴³ Justin Elliott, *How Many Private Contractors Are There in Afghanistan? Military Gives Us a Number*, TALKING POINTS MEMO (Dec. 2, 2009, 2:37 PM), http://tpmmuckraker.talkingpointsmemo.com/2009/12/so_how_many_private_contractors_are_there_in_afgha.php.

⁴⁴ See Singer, *supra* note 39 (noting that these contractors often escape prosecution because they have a “murky” legal status under international law, they often operate in failed nations that lack the resources or jurisdiction to effectively prosecute them, and their home governments often lack the means to enforce criminal laws extraterritorially).

⁴⁵ Capps, *supra* note 38.

⁴⁶ A CID investigation was terminated when it was determined that neither the Army nor the U.S. Government had a long-arm statute under which they could prosecute crimes committed in another country. *Id.* The Army believed that Bosnia had the required jurisdiction and turned over the results of the investigation to Bosnian police, but Bosnia declined to arrest or prosecute the men, citing their belief that they lacked the legal authority to do so. See Robert Capps, *Crime Without Punishment*, SALON (June 27, 2002, 5:03 PM), http://www.salon.com/2002/06/27/military_10/singleton.

⁴⁷ Schwellenbach & Leonnig, *supra* note 11.

⁴⁸ Stillman, *supra* note 17, at 61.

⁴⁹ Ben Wieder, *KBR Subcontractor in Iraq Gets U.S. Contracts Despite Human Trafficking Allegations*, iWATCH NEWS (June 16, 2011, 12:44 PM), <http://www.iwatchnews.org/node/4897>.

facility in Baghdad's Green Zone.⁵⁰ Similarly, in 2009, James Gordon, a former ArmorGroup management official, filed a suit alleging that he had been forced to resign after reporting to a State Department contracting officer that ArmorGroup employees frequented brothels in Kabul and bragged about owning women.⁵¹ In a 2010 interview, Gordon expressed frustration with the perceived lack of response to his reports, asking, "[I]f you have a zero-tolerance policy, why aren't you doing anything?"⁵² Most recently, in February 2010, the U.S. Army investigated reports that AAFES subcontractors were engaged in forced-labor practices with trafficked women.⁵³ It is clear that the U.S. Government's policy objectives, without more, are insufficient to protect persons abroad from trafficking.

II. THE CURRENT LEGAL LANDSCAPE

The current legal framework authorizing the prosecution of crimes committed by civilian contractors abroad is a patchwork of overlapping, yet underinclusive, federal statutes. There are three main avenues through which the government may charge and try a civilian who is accused of committing a human trafficking offense while abroad. Two of those avenues lead to federal court, while the other opens up the possibility of a trial in the military system.

The Trafficking Victims Protection Act ("TVPA"),⁵⁴ passed in 2000, is the main federal statute that criminalizes human trafficking both at home and abroad. The TVPA is supplemented by an additional federal statute, the Military Extraterritorial Jurisdiction Act,⁵⁵ which, by allowing the extraterritorial application of felony-level offenses committed by contractors supporting particular government missions abroad, provides a jurisdictional hook through which anti-trafficking laws can be applied against civilian contractors.⁵⁶ A recently established alternative is trial in the military system through the

⁵⁰ Stillman, *supra* note 17, at 61.

⁵¹ See Schwellenbach & Leonnig, *supra* note 11; Gordon v. ArmorGroup, N.A., No. 1:10cv002 (JCC), 2010 WL 3418219, at *1-3 (E.D. Va. Aug. 27, 2010). The United States joined the suit in April 2011. ArmorGroup settled in 2011 for \$7.5 million, \$1.35 million of which went to Gordon. *Armor Group North America and Its Affiliates Pay \$7.5 Million to Resolve False Claims Act Allegations*, DEP'T OF JUSTICE (July 7, 2011), <http://www.justice.gov/opa/pr/2011/July/11-civ-889.html>.

⁵² Schwellenbach & Leonnig, *supra* note 11.

⁵³ *Id.*

⁵⁴ Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7112 (2006).

⁵⁵ Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267 (2006).

⁵⁶ *Id.* §§ 3261, 3267.

grant of jurisdiction found in UCMJ article 2(a)(10).⁵⁷ Currently, the UCMJ contains a punitive article that criminalizes both patronizing a prostitute and pandering⁵⁸—offenses that are often linked to human trafficking—but does not criminalize trafficking itself. For reasons discussed in this Part, the current framework leaves gaps that hinder the effective prosecution of human trafficking offenses committed by civilians and military personnel serving in support of the U.S. Government's operational missions overseas.

A. *The Trafficking Victims Protection Act*

The TVPA, passed originally in 2000 and subsequently amended and reauthorized in 2003, 2005, and 2008, is the primary vehicle by which the U.S. Government prosecutes human trafficking offenses.⁵⁹ The stated purposes of the TVPA “are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”⁶⁰ The Act provides for the prosecution and punishment of individuals who engage in labor trafficking,⁶¹ sex trafficking of children, or sex trafficking of an adult by force, fraud, or coercion.⁶² The various punishments authorized under the TVPA include sentences of up to twenty years imprisonment for forced labor trafficking⁶³ and life imprisonment for individuals who traffic children for commercial sex acts or adults for commercial sex acts through the use of force, fraud, or coercion.⁶⁴ In its original formulation, the TVPA did not apply extraterritorially;⁶⁵ Congress amended the Act in 2005 to apply explicitly to civilian employees of the United States in foreign countries.⁶⁶ Although this bipartisan piece of legislation has led to improvements in protection for

⁵⁷ 10 U.S.C. § 802(a)(10) (2006).

⁵⁸ 10 U.S.C. § 920.

⁵⁹ Margaret Maffai, Comment, *Accountability for Private Military and Security Company Employees That Engage in Sex Trafficking and Related Abuses While Under Contract with the United States Overseas*, 26 WIS. INT'L L.J. 1095, 1116 (2009).

⁶⁰ 22 U.S.C. § 7101(a) (2006).

⁶¹ 18 U.S.C. § 1590 (2006).

⁶² *Id.* § 1591.

⁶³ *Id.* § 1590.

⁶⁴ *Id.* § 1591.

⁶⁵ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464, 1487.

⁶⁶ Trafficking Victims Reauthorization Act of 2005, Pub. L. No. 109-164, § 103, 119 Stat. 3558, 3562 (2006).

trafficking victims⁶⁷ and increased scrutiny for trafficking trends worldwide in the form of the State Department's annual Trafficking in Persons Report,⁶⁸ commentators have pointed out significant loopholes in the construction and enforcement of the TVPA that make its application against civilian contractors serving in areas of contingency operations problematic.⁶⁹

The TVPA's primary weakness lies in its statutory definitions of trafficking offenses.⁷⁰ The TVPA only reaches "severe" forms of trafficking,⁷¹ defined as either sex trafficking where the person involved was under eighteen, or sex and labor trafficking by means of force, fraud, or coercion.⁷² Moreover, the TVPA's findings section explains that "force" includes "rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion."⁷³ "Coercion," in turn, is defined as threats of serious harm or physical restraint, "any scheme, plan, or pattern" intended to cause a person to believe that failure to cooperate would result in serious harm or physical restraint, or threatened abuse of the legal process.⁷⁴

⁶⁷ Maffai, *supra* note 59, at 1117 (discussing such protections as legal assistance and the availability of T- and U-visas for trafficking victims to remain in the United States).

⁶⁸ *Id.*

⁶⁹ *Id.* at 1117–22.

⁷⁰ Another weakness in the TVPA is in its oversight mechanisms. There are no provisions for audits of trafficking-related reporting and discipline by contractors, so the TVPA relies on self-reporting and voluntary compliance on the part of civilian contractors. See Tenley A. Carp, *The FAR and DFARS Ban on Human Trafficking—Heavy on Rhetoric, Light on Enforcement*, 49 GOV'T CONTRACTOR ¶ 12 (2007). This reliance is, unfortunately, misplaced. As D.C. government contracts attorney Tenley A. Carp points out, DOD's internal investigation of alleged abuses indicates that contractors are not complying with the TVPA's self-policing requirements. *Id.* Carp uses the examples of DynCorp, the trafficking of Nepalese workers into Iraq for work, and investigations by the office of the commanding general of Multi-National Force–Iraq that confirmed extensive abuses of the subcontractor system in violation of U.S. and Iraqi law. *Id.* In 2011, the United States Agency for International Development created an entity to proactively monitor and debar contractors engaged in human trafficking. 2011 TRAFFICKING IN PERSONS REP., *supra* note 1, at 377. Though this is a step in the right direction, the ability to prosecute offenders criminally remains a critical tool in enforcing the United States' zero-tolerance policy for human trafficking.

⁷¹ 22 U.S.C. §§ 7102, 7106 (2006).

⁷² *Id.* § 7102(8). This section states that severe forms of trafficking include:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Id.

⁷³ *Id.* § 7101(b)(6).

⁷⁴ *Id.* § 7102(2).

Commentators have criticized this definition of coercion as unduly narrow.⁷⁵ For example, debt bondage—when a person’s labor is demanded in repayment for a loan⁷⁶—only rises to the level of coercion when the value of the services provided by the laborer “is not applied toward the liquidation of the debt or the length and nature of those services are not . . . limited and defined.”⁷⁷ Thus, as commentators have pointed out, under its own statutory definitions, the TVPA would not reach a contractor who procures adult women for prostitution in Turkey and brings them into Iraq where they are required to work off the cost of the journey and living expenses before being allowed to return home.⁷⁸ Because the trafficker did not use force, fraud, or coercion as defined under the Act, he did not engage in a *severe* form of trafficking in persons and therefore cannot be prosecuted under the TVPA.⁷⁹

Additionally, absent physical restraint, coercion requires “serious harm,” defined as any harm that is “sufficiently serious . . . to compel a reasonable person of the same background and in the same circumstances” to continue to perform the required labor⁸⁰ or sexual activity.⁸¹ There are two problems with this requirement. First, as commentators have noted, the TVPA’s formulation equates to a belief that, up to the point when “severe force” is exerted on the victim, he or she is able to consent.⁸² By comparison, the much broader United Nations Palermo Protocol, enacted in 2000, defines coercion as including “the abuse of power or of a position of vulnerability,”⁸³ a definition that would easily encompass the actions by the trafficker in the Turkey-Iraq hypothetical above.⁸⁴ The Palermo Protocol thus covers

⁷⁵ See Maffai, *supra* note 59, at 1118–19.

⁷⁶ 22 U.S.C. § 7102(4).

⁷⁷ Maffai, *supra* note 59, at 1118.

⁷⁸ *Id.* at 1119. Maffai’s example involves an Iraqi woman trafficked into Syria, but the inapplicability of the TVPA is the same in both examples.

⁷⁹ *Id.*

⁸⁰ 18 U.S.C. § 1589(c)(2) (Supp. IV 2010).

⁸¹ *Id.* § 1591(e)(4).

⁸² Jane Kim, Note, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 VA. J. INT’L L. 443, 492 (2011). Jane Kim also notes that this emphasis on physical force in analyzing whether a specific harm has occurred is a common feature of U.S. rape law. *Id.* at 490.

⁸³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), Dec. 25, 2003, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

⁸⁴ Another potential approach would be to eliminate the baseline proof requirement of coercion entirely. The 2008 reauthorization of the TVPA as proposed by the House would have done exactly that, by making acts of trafficker fraud, force, or coercion aggravating factors in

more types of pressure than physical coercion, including psychological pressure, and submission to psychological pressure is not equivalent to consent under this definition.⁸⁵ The second problem with the TVPA's definition of coercion is that it is often difficult to prove. By contrast, the Palermo Protocol's definition, with its focus on exploitation, greatly reduces the prosecutorial burden of proving coercion, which is often considered an insurmountable obstacle in the context of trafficking cases.⁸⁶ In short, although the TVPA represents significant strides forward in combating human trafficking, its legal force against civilian contractors is diluted due to its narrow statutory definitions.⁸⁷

B. *The Military Extraterritorial Jurisdiction Act*

The Military Extraterritorial Jurisdiction Act ("MEJA") was passed in 2000⁸⁸ and gives federal prosecutors a jurisdictional hook

sentencing. H.R. 3887, 110th Cong. § 2429 (2007). This would have aided in the prosecution of trafficking offenses, particularly in the cases of rape or sex trafficking where the coercion requirement is often difficult to prove. Cf. Michelle J. Anderson, *Prostitution and Trauma in U.S. Rape Law*, in *PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS* 75, 80–81 (Melissa Farley ed., 2004). However, a coalition of the Department of Justice ("DOJ"), the Erotic Service Providers Union ("ESPU"), and the American Civil Liberties Union ("ACLU") lobbied the Senate to oppose the change; DOJ because it infringed on states' rights, and the ESPU and ACLU because it infringed on a woman's right to choose prostitution as a profession. See Lindsay Strauss, Note, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL'Y 495, 523–24 (2010). As a result, the definition of coercion in the final version of the bill was the same as in the original 2000 version of the TVPA. See 22 U.S.C. § 7102(2) (2000). This Note proposes a middle course between the definition in the Palermo Protocol and the language of the failed TVPA reauthorization, i.e., a broader definition of "coercion" and a two-tiered offense where force, fraud, and coercion are aggravating factors rather than baseline elements of the offense. See *infra* Part III.

⁸⁵ Cf. Kim, *supra* note 82, at 494 (noting that the Palermo Protocol recognizes that persons in vulnerable situations cannot consent to being trafficked).

⁸⁶ See *id.* at 452 (noting that the Palermo Protocol focuses on exploitation rather than coercion and draws "no distinction" between a victim who can prove she was coerced and one who cannot); see also *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 75 (2007) (statement of Dorchen A. Leidholdt, Director, Sanctuary for Families' Center for Battered Women's Legal Services) (arguing that the "force, fraud, or coercion" requirement wrongly puts the onus on the victim rather than the trafficker).

⁸⁷ Maffai, *supra* note 59, at 1122. The TVPA has two additional problems, shared with MEJA, that significantly complicate its application to civilian contractors: the motivational and evidentiary obstacles unique to stateside prosecution of overseas misconduct. See *infra* notes 94–98 and accompanying text.

⁸⁸ Military Extraterritorial Jurisdiction Act (MEJA) of 2000, Pub. L. No. 106-523, 114 Stat. 2488. Despite temporal proximity, MEJA's passage apparently was not explicitly motivated by the DynCorp case. See Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 CATH. U. L. REV. 55, 80 (2001). Instead, MEJA was motivated by a complaint to Senator Jeff Sessions from one of his constituents that a crime

that allows them to bring criminal cases in U.S. courts against contractors and employees who commit felony-level crimes while supporting a DOD mission abroad.⁸⁹ The Act's stated purpose was to close the gap in federal law that permitted those who accompanied the U.S. Armed Forces overseas to "get away with murder."⁹⁰ In December 2005, DOD issued an implementing regulation for MEJA, which requires the DOD Inspector General to inform the Attorney General if he suspects that a federal crime has been committed.⁹¹ Under the regulation, the Department of Justice's ("DOJ") Criminal Division acts as a liaison between DOD and other federal agencies, as well as designates a U.S. Attorney to prosecute the case.⁹²

MEJA, while a useful tool in a prosecutor's toolkit, is in and of itself insufficient to combat the problem of human trafficking by civilian contractors. As other commentators have noted, MEJA's applicability, which is limited to persons "supporting the mission of the DOD," insulates contractors working in support of other federal agency missions, citizens of host nations, and U.S. citizens working for the United States but paid by other countries.⁹³ MEJA's primary deficiencies, however, are motivational and evidentiary.

Individual offices of the U.S. Attorney handle MEJA prosecutions.⁹⁴ Because these offices are generally separated by vast geographical distances from the nations where civilian contractors function (and where their alleged victims are located), there are often enormous obstacles that hinder successful prosecutions, including the difficulty in gathering evidence from distant locations days, or even weeks, after an alleged crime⁹⁵ and the daunting task of securing witnesses to testify in the United States.⁹⁶ As Peter Singer, a senior fellow in Foreign Policy at the Brookings Institution, pointed out when

committed by the son of a service member on a U.S. base in Germany had gone unpunished. *See id.*

⁸⁹ See 18 U.S.C. §§ 3261(a)(1), 3267(1)(A) (2006). While its original language only covered DOD contractors, MEJA was amended in 2004 to cover contractors of any governmental agency supporting the mission of DOD. *See id.* § 3267(1)(A).

⁹⁰ 146 CONG. REC. S11,183 (daily ed. Oct. 26, 2000) (statement of Sen. Patrick Leahy).

⁹¹ JENNIFER K. ELSEA, MOSHE SCHWARTZ & KENNON H. NAKAMURA, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 24–25 (2008).

⁹² *Id.* at 25.

⁹³ Margaret Prystowsky, *The Constitutionality of Court-Martialing Civilian Contractors in Iraq*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 45, 56–57 (2008).

⁹⁴ Maffai, *supra* note 59, at 1114.

⁹⁵ Johnathan Finer, Recent Developments, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT'L L. 259, 263 (2008).

⁹⁶ *Id.* at 264.

discussing these hurdles, “[N]o U.S. Attorney likes to waste limited budgets on such messy, complex cases 9,000 miles outside their district, even if they were fortunate enough to have the evidence on hand.”⁹⁷ Human trafficking—a messy, complicated offense made even more complex when it occurs in areas of contingency operations—provides ample opportunities for these obstacles to arise.⁹⁸

MEJA’s motivational and evidentiary problems are reflected in the low number of successful MEJA prosecutions. In the ten years since its passage, MEJA has been used to prosecute only twenty-seven former military members, civilian dependents, and civilian contractors.⁹⁹ Only fifteen of these prosecutions or attempted prosecutions were against civilian contractors in Iraq and Afghanistan.¹⁰⁰ Moreover, the majority of the charged offenses concerned sexual assault or possession of child pornography rather than human trafficking.¹⁰¹

⁹⁷ P.W. Singer, *The Law Catches Up to Private Militaries, Embeds*, DEFENSETECH (Jan. 3, 2007), <http://defensetech.org/2007/01/03/the-law-catches-up-to-private-militaries-embeds>. Singer’s view was echoed by Stephen Paul Cullen, a former JAG attorney: “If you have a case where it will take a significant amount of effort to get the evidence to bring the case . . . it will be very hard for the Justice Department to do it.” Schwellenbach & Leonnig, *supra* note 11.

⁹⁸ In 2007, employees of the private security company Blackwater shot and killed seventeen Iraqis in what is known as the Nissour Square shooting. See *Finer, supra* note 95, at 259. The failure of DOJ to prosecute any of the offenders under MEJA led to a realization that the law needed to be amended. See *Maffai, supra* note 59, at 1126–27. In response, the House of Representatives passed the MEJA Expansion and Enforcement Act of 2007, H.R. 2740, 110th Cong. (2007), which would have made several significant improvements both in MEJA’s jurisdictional reach and the efficiency of federal investigations prior to prosecution. See *Maffai, supra* note 59, at 1126. First, it would have extended the reach of MEJA to all civilian contractors operating in an area where the Armed Forces were conducting a contingency operation, not just those directly hired by or supporting a DOD mission. *Id.* Second, it would have created Theater Investigative Units of the FBI, which would have reviewed allegations of criminal misconduct by contractors. *Id.* However, after the bill passed the House on October 4, 2007, the Senate failed to act on it. *H.R. 2740: MEJA Expansion and Enforcement Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-2740> (last visited Mar. 14, 2012). To date, MEJA’s jurisdictional and evidentiary problems remain. Another bill, called the Civilian Extraterritorial Jurisdiction Act, S. 1145, 112th Cong. (2011), is currently stalled in the Senate. See *S.1145: CEJA*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s112-1145> (last visited Mar. 14, 2012). If it passes, it would grant U.S. courts jurisdiction over crimes committed by all federal contractors abroad. *Id.* Even if this bill is—or the MEJA expansion had been—enacted, however, prosecutions of trafficking offenses would still suffer due to the narrow statutory definitions in the TVPA. See *supra* Part II.A.

⁹⁹ *MEJA Statistics as of June 30, 2010*, U.S. DEP’T OF DEF., http://www.dod.gov/dodgc/images/meja_statistics.pdf (last visited Mar. 14, 2012).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* According to the published summary, as of 2010, there had been four MEJA referrals for murder, three for kidnapping, four for aggravated assault, six for detainee abuse, eleven for sexual assault, four for theft offenses, three for weapons offenses, one for sale or damage of government property, and six for child pornography. *Id.* The total number of attempted prosecutions for crimes committed in Iraq or Afghanistan is twenty-nine. *Id.* Of those, seventeen had

Given the sheer number of contractors who have been in Iraq and Afghanistan over the last eight years,¹⁰² twenty-seven is an absurdly low number of prosecutions.¹⁰³ To date, only one contractor has been referred to DOJ for trafficking under MEJA,¹⁰⁴ but no prosecution ever resulted.¹⁰⁵

Given MEJA's shortcomings, it is no surprise that members of Congress have looked for another method to curb contractor abuses. They found that method in the 2006 amendment to article 2(a)(10) of the UCMJ.

C. *The Uniform Code of Military Justice*

Before examining article 2(a)(10)'s grant of jurisdiction over civilian contractors, it is useful to briefly examine the military justice system and its history.

After the various military services were consolidated into a single DOD after World War II,¹⁰⁶ Congress, understanding the need for a single body of law that would apply across all branches of the military, passed the UCMJ pursuant to its Article I, Section 8 constitutional powers to regulate the armed forces.¹⁰⁷ According to Professor Edmund Morgan, the Harvard Law professor appointed by Congress to chair the committee in charge of drafting appropriate legislation, the committee's task was to ensure full protection of the rights of individuals subject to the UCMJ without unduly interfering with military discipline.¹⁰⁸ Because the President is designated in Article II, Section 2

been disposed of by July 2011: one dismissal, two acquittals, and fourteen convictions. 2011 List of Prosecutions from MEJA & SMTJ Referrals (updated July 15, 2011) (unpublished list of prosecutions) (on file with the author).

¹⁰² See *supra* notes 42–43 and accompanying text.

¹⁰³ Peter Singer, the eminently quotable Brookings Institute scholar, put it this way: "Given the raw number of contractors, let alone the incidents we know about, it boggles the mind." Griff Witte, *New Law Could Subject Civilians to Military Trial*, WASH. POST, Jan. 15, 2007, at A1.

¹⁰⁴ *MEJA Statistics as of June 30, 2010*, *supra* note 99.

¹⁰⁵ See 2011 TRAFFICKING IN PERSONS REP., *supra* note 1, at 377; see also Nick Schwel-lenbach, *Pentagon Contractor Employee Investigated for Human Trafficking, Fired . . . But No Prosecutions or Contract Terminations*, PROJECT ON GOV'T OVERSIGHT (June 28, 2001, 10:37 AM), <http://pogoblog.typepad.com/pogo/2011/06/pentagon-contractor-employee-investigated-for-human-trafficking-fired.html>.

¹⁰⁶ *About the Department of Defense*, U.S. DEP'T OF DEF., <http://www.defense.gov/about/#history> (last visited Mar. 14, 2012).

¹⁰⁷ See U.S. CONST. art. I, § 8; see also Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 222–24 (2003).

¹⁰⁸ Behan, *supra* note 107, at 222; see also Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 174 (1953).

as the Commander-in-Chief,¹⁰⁹ the UCMJ is implemented through the executive orders of the President pursuant to his authority under article 36 of the UCMJ.¹¹⁰ Those executive orders form a comprehensive volume of laws and procedural rules known as the Manual for Courts-Martial (“MCM”).¹¹¹ As the MCM preamble states, “[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”¹¹² The military justice system thus has dual purposes: it is a vehicle for both the punishment of criminal offenses and the maintenance of good order and discipline.¹¹³

Owing in large part to these dual purposes, several important differences exist between the civilian and military systems: an “article 32” hearing replaces the civilian grand jury;¹¹⁴ the composition of a military jury is different from a civilian jury;¹¹⁵ and UCMJ substantive law criminalizes certain offenses that have no analogues in the civilian system. These offenses include disrespect offenses,¹¹⁶ unauthorized absence offenses,¹¹⁷ prohibited relationship offenses,¹¹⁸ and, under the

¹⁰⁹ U.S. CONST. art. II, § 2.

¹¹⁰ 10 U.S.C. § 836 (2006).

¹¹¹ MANUAL FOR COURTS-MARTIAL UNITED STATES (2012).

¹¹² *Id.* pt. I, ¶ 3.

¹¹³ *See id.*

¹¹⁴ Although the military’s article 32 hearing is often pointed to as a deficiency in the military justice system, it should be noted that the hearing is far more protective of an accused’s rights than a civilian grand jury. Unlike his civilian counterpart, a military defendant has the right to be present and represented by counsel, to confront and cross-examine witnesses, to put on his own witnesses, and to introduce evidence in support of his theory of the case. *See* Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1218–19 (2008); Homer E. Moyer, Jr., *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 ME. L. REV. 105, 116–17 (1970).

¹¹⁵ *See generally* Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992). A military panel is selected by the court-martial convening authority, who selects members based on those individuals under his command who “are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” 10 U.S.C. § 825(d)(2). Unlike a defendant in a civilian trial, a military defendant has no right to a panel that represents a cross-section of the eligible military population. *United States v. Lewis*, 46 M.J. 338, 341 (C.A.A.F. 1997).

¹¹⁶ Disrespect offenses in the UCMJ include Disrespect Toward Superior Commissioned Officer, 10 U.S.C. § 889; Assaulting or Willfully Disobeying Superior Commissioned Officer, *id.* § 890; and Insubordinate Conduct Toward Warrant Officer, Noncommissioned Officer, or Petty Officer, *id.* § 891.

¹¹⁷ Unauthorized Absence offenses include Desertion, *id.* § 885, and Absence Without Leave, *id.* § 886.

¹¹⁸ The military prohibits relationships that would not—or could not—be criminalized in a civilian context. These offenses tend to be the most controversial and include the article 134

UCMJ article 134 catchall provision, any offense that interferes with the military's good order and discipline or brings discredit upon the service.¹¹⁹

There are several different levels of courts-martial, each convened by a different level of command: the summary court-martial, which might be thought of as a petty offense court;¹²⁰ the special court-martial, which adjudicates crimes that carry no more than one-year confinement;¹²¹ and the highest level of court-martial, the general court-martial, for felony-grade offenses.¹²² Jurisdiction over any type of court-martial only exists when, inter alia, the court-martial can establish in personam jurisdiction over the accused.¹²³ A court-martial's in personam jurisdiction is outlined in UCMJ article 2, which includes members of the Armed Forces¹²⁴ and civilians accompanying the force during a time of war or contingency operation.¹²⁵

1. *Article 2(a)(10) and Jurisdiction over Contractors*

Until recently, the UCMJ could only be applied against civilians accompanying the armed forces "in time of declared war."¹²⁶ In 1970, the highest military court, the Court of Military Appeals, interpreted this language to mean that the UCMJ could only be applied to civilians during a *congressionally declared* war, thereby invalidating an attempt to try, by court-martial, a civilian contractor accompanying the armed forces in Vietnam.¹²⁷ In 2006, however, Congress undertook a "clarification" of article 2(a)(10) by amending its language to include contingency operations.¹²⁸ Senator Lindsay Graham, one of the proponents of the change, stated that he sought to make the administration of justice more efficient and to give commanders more control by placing contractors under UCMJ jurisdiction.¹²⁹ In 2008, this grant of jurisdiction was used to court-martial a civilian contractor, Alaa Mo-

offenses of Fraternalism and Adultery, MANUAL FOR COURTS-MARTIAL UNITED STATES pt. IV, ¶¶ 62, 83 (2012), and the article 125 offense of Sodomy, 10 U.S.C. § 925.

¹¹⁹ *Id.* § 934.

¹²⁰ *Id.* § 820.

¹²¹ *Id.* § 819.

¹²² *Id.* § 818.

¹²³ *United States v. Choy*, 33 M.J. 1080, 1082 (A.C.M.R. 1992).

¹²⁴ 10 U.S.C. § 802(a)(1).

¹²⁵ *Id.* § 802(a)(10).

¹²⁶ *Id.*

¹²⁷ *United States v. Averette*, 41 C.M.R. 363, 365 (1970).

¹²⁸ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364; § 552, 120 Stat. 2083, 2217 (2006).

¹²⁹ Witte, *supra* note 103.

hammered Ali, for stabbing another civilian contractor after an argument.¹³⁰ Under the military system, because Ali pleaded guilty to a lesser-included offense that carried a jail sentence of less than a year,¹³¹ his case was not entitled to an automatic review by the Army Court of Criminal Appeals.¹³² However, given the desire to determine the constitutionality of the revised article 2(a)(10), the U.S. Army Judge Advocate General certified the case to the Army Court of Criminal Appeals (“ACCA”) for review.¹³³ The ACCA held that civilian contractors accompanying military forces in the field during contingency operations are constitutionally subject to the UCMJ under the expanded article 2(a)(10) provision.¹³⁴

Despite the ACCA’s holding, the constitutionality of article 2(a)(1) has been debated extensively.¹³⁵ This debate is beyond the scope of this Note. It is important to mention, however, that the change was duly enacted by Congress and, until invalidation by the Supreme Court, it allows the UCMJ to be applied against any civilian contractors accompanying the Armed Forces in either declared wars or contingency operations like those in Iraq and Afghanistan.

¹³⁰ Emma Schwartz, *First Contractor Charged Under Military Justice System*, U.S. NEWS & WORLD REP. (Apr. 5, 2008), <http://www.usnews.com/articles/news/iraq/2008/04/05/first-contractor-charged-under-military-justice-system.html>.

¹³¹ The Associated Press, *Contractor Convicted in Rare Court-Martial*, MILITARY TIMES (June 22, 2008, 12:45 PM), http://www.militarytimes.com/news/2008/06/ap_contractor_court-martial_062208/.

¹³² 10 U.S.C. § 866(b)(1) (2006).

¹³³ *United States v. Ali*, 70 M.J. 514, 515 (A. Ct. Crim. App. 2011); Michelle Lindo McCluer, *TJAG Certifies Civilian Court-Martial Verdict to ACCA*, CAAFL0G (Mar. 30, 2011), <http://www.caaflog.com/2011/03/30/tjag-certifies-civilian-court-martial-verdict-to-acca>.

¹³⁴ *Ali*, 70 M.J. at 518–21. This case was argued before the Court of Appeals for the Armed Forces on April 5, 2012. Oral Argument, *United States v. Ali*, No. 12-0008/AR, available at <http://www.armfor.uscourts.gov/newcaaf/calendar/2012-04.htm#4> (last visited Apr. 30, 2012).

¹³⁵ See, e.g., Katherin J. Chapman, Note, *The Untouchables: Private Military Contractors’ Criminal Accountability Under the UCMJ*, 63 VAND. L. REV. 1047, 1071–79 (2010) (concluding that the Constitution allows courts-martial jurisdiction over military contractors when certain limitations are implemented); Andres Healy, Note, *The Constitutionality of Amended 10 U.S.C. § 802(A)(10): Does the Military Need a Formal Invitation to Reign in “Cowboy” Civilian Contractors?*, 62 FLA. L. REV. 519, 543 (2010) (finding the Constitution to permit the expansion of military justice to civilians accompanying armed forces outside the context of a declared war). But see Anna Manasco Dionne, Note, *“In Time of Whenever the Secretary Says”: The Constitutional Case Against Court-Martial Jurisdiction over Accompanying Civilians During Contingency Operations*, 27 YALE L. & POL’Y REV. 205, 237–38 (2008) (arguing that Congress lacks either the rulemaking or war powers authority to extend UCMJ jurisdiction over civilian contractors).

2. *Patronizing a Prostitute and Pandering*

On October 14, 2005, President Bush, by executive order, added “patronizing a prostitute” to the prohibitions against prostitution and pandering that are currently contained in article 134 of the UCMJ.¹³⁶ This section punishes those who “compel[], induce[], entice[], or procure” a prostitute to engage in a sex act for money or other compensation.¹³⁷ The maximum punishment for either prostitution or patronizing a prostitute is, *inter alia*, confinement for one year.¹³⁸ Pandering, or recruiting another for prostitution, carries a maximum punishment of five years’ confinement.¹³⁹

Although these punitive articles were intended to aid DOD in enforcing its zero-tolerance policy for human trafficking,¹⁴⁰ they do not go far enough. The primary deficiency is that these articles define trafficking in terms of sex and prostitution rather than in terms of forced labor. Human trafficking is a much broader problem that involves the exploitation of men, women, and children in both sex and nonsex sectors.¹⁴¹ As noted by Professor Janie Chuang, a former trafficking advisor to the U.N. Office of the High Commissioner for Human Rights, antitrafficking laws and policies have remained focused on sex trafficking and prostitution despite the recognition that human trafficking involves a much wider range of activities than just sexual slavery.¹⁴² Defining trafficking in terms of prostitution and sexual slavery conflates the two and narrows the focus of antitrafficking efforts, rendering them significantly less effective.¹⁴³ The deficiencies in the UCMJ antiprostitution article have thus rendered the article ineffective as a tool in efforts to uphold DOD’s antitrafficking policies.

Even as a tool to combat sex trafficking, the UCMJ article falls somewhat short because the prescribed punishments are not commensurate with other antitrafficking laws like the TVPA. Violating these

¹³⁶ Exec. Order No. 13,387, 70 Fed. Reg. 60,697, 60,701 (Oct. 17, 2005).

¹³⁷ MANUAL FOR COURTS-MARTIAL UNITED STATES pt. IV, ¶ 97b(2)(b) (2012).

¹³⁸ *Id.* ¶ 97e(1).

¹³⁹ *Id.* ¶ 97e(2).

¹⁴⁰ *See Enforcing U.S. Policies Against Trafficking in Persons: How is the Military Doing?: Hearing Before the H. Armed Servs. Comm. & Comm’n on Sec. and Cooperation in Eur.*, 108th Cong. 10–11 (2004) (statement of Hon. Charles S. Abell, Principal Deputy Under Secretary of Defense for Personnel and Readiness).

¹⁴¹ Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1657 (2010).

¹⁴² *Id.*

¹⁴³ *See id.*

punitive articles would earn a maximum of one to five years in prison depending on the charge,¹⁴⁴ whereas violating the TVPA could earn a trafficker up to life in prison.¹⁴⁵

The problems with the current legal framework—both civilian and military—hinder effective prosecution of civilian contractors who commit trafficking offenses while supporting DOD operations abroad. Under the current law, neither Faye nor Vinnie could obtain justice because of the significant evidentiary hurdles in proving the means element of trafficking under the TVPA¹⁴⁶ and the significant logistical difficulties in prosecuting cases 2,000 miles from where the crimes occurred.¹⁴⁷ The next Section of this Note argues for an amendment to the UCMJ that would provide a tool by which these crimes can be effectively prosecuted.

III. FILLING THE GAPS: A MILITARY JUSTICE SOLUTION

As the above discussion makes clear, human trafficking is a large-scale problem to which the activities of civilian contractors working for the U.S. military abroad significantly contribute and which current laws insufficiently address. A solution that supplements the current legal framework is needed, and that solution is best provided by the military criminal justice system.

A. *Countering the Evidentiary and Motivational Hurdles*

The primary problems with any federal prosecution of overseas misconduct are evidentiary and motivational.¹⁴⁸ On a limited budget,¹⁴⁹ U.S. Attorneys may be reluctant to bring a case when successful prosecution will depend on evidence and witnesses gathered thousands of miles away.¹⁵⁰ One significant practical difficulty is that FBI investigators would have to be deployed from the United States to investigate the crime; by the time they arrive, the evidence could be contaminated and witnesses could be impossible to locate.¹⁵¹ These problems are effectively illustrated by the relative dearth of prosecu-

¹⁴⁴ See *supra* notes 138–39 and accompanying text.

¹⁴⁵ 18 U.S.C. § 1591 (2006).

¹⁴⁶ See *supra* notes 75–86 and accompanying text.

¹⁴⁷ See *supra* notes 94–98 and accompanying text.

¹⁴⁸ See *supra* Part II.B.

¹⁴⁹ In 2009, the budget for the entire DOJ Criminal Division was \$164.1 million. Budget for General Legal Activities Criminal Division for 2010, DEP'T OF JUSTICE, <http://www.justice.gov/jmd/2010summary/pdf/crm-bud-summary.pdf> (last visited Mar. 14, 2012).

¹⁵⁰ See *supra* notes 94–98 and accompanying text.

¹⁵¹ Prystowsky, *supra* note 93, at 59–60.

tions under MEJA despite numerous allegations of contractor misconduct.¹⁵²

Use of the military justice system to address human trafficking would effectively combat the problems that hamper effective investigations and prosecutions under federal law. The evidentiary hurdles—accessing witnesses and ensuring sufficient chain of custody—would be ameliorated by the use of military criminal investigators. As opposed to FBI officials, who are based in the United States, military criminal investigative units are already present where the armed forces are serving abroad.¹⁵³ Their proximity to the nexus of events would presumably allow them to initiate investigations much more quickly than FBI officials who would have to travel overseas.

Similarly, use of the military system would bypass the motivational hurdles that obstruct prosecutions. Rather than requiring witnesses and evidence to be transported to the United States for trial, prosecutions would take place in military courts established on U.S. military bases in the country where the alleged crimes occurred. Contractors brought to trial in these military courts would have many of the same rights as they would if the trial were held in the federal court system, including rights to counsel, rights to confront adverse witnesses, and other associated constitutional protections.¹⁵⁴

The solution proposed by this Note is not intended to replace completely the current federal framework for prosecuting contractor malfeasance. Instead, this Note proposes a system of concurrent criminal jurisdiction which would allow military prosecutors to fill in the gaps in federal law that allow civilian contractors to escape prosecution. The current DOD implementing instruction for article 2(a)(10) jurisdiction requires that all proposed courts-martial be reported to

¹⁵² See *supra* notes 99–104 and accompanying text.

¹⁵³ See, e.g., *Mission in Depth*, U.S. ARMY CRIMINAL INVESTIGATION COMMAND, <http://www.cid.army.mil/mission2.html> (last visited Mar. 14, 2012).

¹⁵⁴ For a thorough breakdown of how various constitutional protections apply in the military system, see Francis A. Gilligan, *The Bill of Rights and Service Members*, *ARMY LAW.*, Dec. 1987, at 3–11. Colonel (ret.) Gilligan notes that in some cases, protections afforded to service members are broader than in civilian courts because the military evidentiary rules are in some ways more restrictive than their federal counterparts. *Id.* There is no doubt that some adjustments could be made when trying civilians in military courts; for example, the rules for selection of (jury) panel members could be made more flexible to allow for the selection of at least some civilians. The rules for requesting enlisted panel members would be instructive here: when an enlisted service member is tried by court-martial, he or she may request that up to one-third of the panel members also be enlisted. *MANUAL FOR COURTS-MARTIAL UNITED STATES R.C.M. 503(a)(2)* (2012). This procedure could be adapted so that panels in courts-martial of civilian contractors include up to one-third civilian members.

the DOJ, giving it fourteen days to choose to prosecute under federal law.¹⁵⁵ If the DOJ so chooses, any military investigations up to that point are turned over to the DOJ for further action.¹⁵⁶ If the DOJ declines to prosecute, the court-martial may go forward.¹⁵⁷ Such a system of concurrent jurisdiction would be consistent with the system that currently exists in the United States.¹⁵⁸

Use of the military system would strike the most appropriate balance between ensuring that crimes are prosecuted, conducting effective investigations in a warzone, and protecting the constitutional rights of the civilians by ensuring their prosecutions take place in a courtroom that operates under the constraints of the U.S. Constitution.¹⁵⁹

*B. The Proposed Punitive Article*¹⁶⁰

To effectively use the military justice system to prosecute trafficking offenses, the UCMJ should be amended to explicitly make human trafficking a crime under military law. Such an amendment,¹⁶¹ along with its proposed implementing executive order,¹⁶² would resolve two issues. First, it would provide military criminal jurisdiction over all personnel supporting the U.S. Government in a declared war or contingency operation who commit trafficking offenses abroad. Second, it would supplement the current prostitution and pandering article by redefining the issue in terms of trafficking as opposed to prostitution, thus encompassing forced labor and bringing the scope of potential punishments in line with federal domestic antitrafficking statutes.

¹⁵⁵ Memorandum from the Secretary of Defense for Secretaries of the Military Departments (Mar. 10, 2008), available at http://www.dod.gov/dodgc/images/ucmj_art2.pdf.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Aside from the peculiarly military offenses such as desertion and fraternization, a service member who commits a crime in the United States may in most cases be brought to trial in either civilian (federal or state) or military courts. See Prystowsky, *supra* note 93, at 64 (citing *Coleman v. Tennessee*, 97 U.S. 509 (1878) (ruling that absent clear and direct language, the Supreme Court would decline to construe statutes as depriving civilian courts of concurrent jurisdiction over soldiers)).

¹⁵⁹ The military justice system, as discussed in Part II, provides protections equivalent to the constitutional protections of the federal system. Another option, which does not provide the same protections, would be to rely on host-nation prosecutions of offenses committed within their borders. Part IV addresses the problems of relying on host nations to prosecute civilian contractors.

¹⁶⁰ For the full text of the proposed amendment and its implementing executive order, see *infra* Appendices A, B.

¹⁶¹ See *infra* Part III.B.1.

¹⁶² See *infra* Appendix B.

1. *The Proposed UCMJ Amendment*¹⁶³

The proposed amendment, the Military Human Trafficking Act of 2012, would amend chapter 47 of title 10 of the U.S. Code (UCMJ) to create two new offenses under military law: human trafficking and aggravated human trafficking. Each would prohibit substantially similar conduct—the trafficking or benefit obtained from trafficking of persons for purposes of exploitation. The elements that would differentiate between the two offenses would be the means used by the accused in engaging in the trafficking, the age of the victim, and any serious bodily injury or death of the victim that occurs as a result of the trafficking. The language of the amendment would be as follows:

§ XX. Art. XX. Human Trafficking¹⁶⁴

(a) Human Trafficking. Any person subject to this chapter who—

(1) recruits, transports, transfers, harbors, or receives another person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of subparagraph (a);

(3) by means of deception or the abuse of power or abuse of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;

(4) for the purposes of exploitation of that person, which for the purposes of this Act shall include, but not be limited to, exploitation of the prostitution of others or other forms of sexual exploitation; forced or coerced labor or services; slavery or practices similar to slavery, such as debt bondage or serfdom; servitude; and other forms of exploitation defined in 22 U.S.C. § 7102;

is guilty of human trafficking and shall be punished as a court-martial may direct.

The accompanying executive order would amend the MCM to provide the relevant definitions.

(1) “Abuse of Power or Abuse of a Position of Vulnerability” shall mean such abuse that the person believes he or she has

¹⁶³ See *infra* Appendix A.

¹⁶⁴ The language of this proposed amendment was created with reference to both the TVPA, 22 U.S.C. §§ 7107–7110 (2006), and the United Nations Office on Drugs and Crime’s Model Law Against Trafficking in Persons, MODEL LAW AGAINST TRAFFICKING IN PERSONS (United Nations Office on Drugs & Crime 2009), available at http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf.

no reasonable alternative but to submit to the labor or services demanded, and includes, but is not limited to, taking advantage of vulnerabilities resulting from illegal entry into the country, a lack of proper documentation, pregnancy or any physical or mental disease or disability, including substance addiction, or reduced capacity to form judgments by virtue of infirmity, a physical or mental disability, or minority.¹⁶⁵

. . .

(4) “Deception” shall mean any conduct that is intended to deceive a person as to the nature of work or services to be provided, the conditions of work, the extent to which the person will be free to leave his or her place of residence, or other circumstances involving the exploitation of the person.¹⁶⁶

(5) “Forced Labor or Services” shall mean the condition of a person who provides labor or services, other than sexual services, and who, because of the use of threats of physical, sexual, or financial harm, physical restraint, abuse of the legal process, debt bondage, retention of passport or identity papers, is not free to cease providing labor or services, or is not free to leave the place or area where the labor or services are provided.

(6) “Sexual Exploitation” shall mean the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude, or other kinds of sexual services, including pornographic acts or the production of pornographic materials.¹⁶⁷

¹⁶⁵ This definition is intended to capture what has been called the “reality of what happens” in the context of trafficking, which is that many victims of trafficking are in a position of vulnerability that leaves them with no other reasonable option but to submit to exploitation. See Kim, *supra* note 82, at 452 (quoting Rep. of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Sessions, *Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation for the Elaboration of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, ¶ 63, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000)).

This language is substantially similar to the definition included in the U.S. State Department Model Law to Combat Trafficking in Persons. The expansiveness of this “model” definition promulgated by the State Department is surprising given the lack of a similar provision in the enacted U.S. antitrafficking statute. See MODEL LAW AGAINST TRAFFICKING IN PERSONS ch. II, § 1(a) (quoting MODEL LAW TO COMBAT TRAFFICKING IN PERSONS (U.S. State Dep’t 2003)).

¹⁶⁶ This is a modification of the U.N. Model Law. See MODEL LAW AGAINST TRAFFICKING IN PERSONS ch. II, § 1(f).

¹⁶⁷ This is a modification of the U.N. Model Law. See *id.* ch. II, § 1(i). It draws primarily from the five major elements that the International Labor Organization identified as indicative

Under this proposed amendment, human trafficking would be the baseline offense. The language in subsections (a)(1) and (a)(2) is similar to the language in the TVPA,¹⁶⁸ and it targets both direct involvement in trafficking activities and receipt of financial or other benefits resulting from the trafficking activities of others. Where this proposed amendment differs substantially from the TVPA is in subsection (a)(3), which articulates the “means” by which the trafficking offense is carried out. Unlike the TVPA, the proposed amendment would reach conduct undertaken by means of deception, abuse of either power or a position of vulnerability, or the exchange of benefits with a third party who has control over the trafficked person.¹⁶⁹ This language implicitly recognizes a fundamental reality in trafficking: victims are often powerless and submit not because they consent to their exploitation but because they feel as though they have no reasonable alternative but to submit.¹⁷⁰ The proposed amendment thus addresses what is arguably the greatest defect in the TVPA: that statute only prohibits “severe” forms of trafficking—those undertaken against a child under the age of eighteen, or by means of force, fraud, or coercion¹⁷¹—thus reducing the chances that a trafficker will be brought to justice.¹⁷²

The TVPA’s definition of “severe” forms of trafficking has its place in the proposed amendment, at least in part, in the form of the offense of aggravated human trafficking:

(b) Aggravated Human Trafficking. Any person subject to this chapter who—

...

(3) by means of force, threats of force, fraud, or coercion;¹⁷³ or against a person who has not yet attained the age of 18 years; or caused serious bodily injury or death to another person while engaged in an act described in violation of subparagraph (a).

of a forced-labor situation. *Id.* Other sources include the State Model Law on Protection for Victims of Human Trafficking and Australia’s Criminal Code Act. *Id.*

¹⁶⁸ 22 U.S.C. § 7102 (2006).

¹⁶⁹ See *infra* Appendix B, where each of these terms is more thoroughly defined.

¹⁷⁰ See Kim, *supra* note 82, at 452.

¹⁷¹ See *supra* notes 71–72 and accompanying text.

¹⁷² Kim, *supra* note 82, at 452–53.

¹⁷³ See *infra* Appendix B. This definition of coercion expands on the definition listed in the TVPA. See 18 U.S.C. § 1591(c)(2) (2006). It recognizes that some forms of coercion are primarily psychological and includes those in the definition. See Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 U. Tol. L. Rev. 941, 959 (2007).

The executive order would amend the MCM to provide the relevant definition.

(2) “Coercion” shall mean use of force or threats of force, and some forms of nonviolent or psychological use of force or threats, including: threats of harm or physical restraint of any person; any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; abuse or any threat linked to the legal status of a person; or psychological pressure.

This offense would provide for heightened penalties when a person engages in a trafficking offense by, *inter alia*, physical and psychological violence, when a victim is under the age of eighteen, or when a victim suffers serious bodily injury or death. Although this language is substantially similar to the definition of “severe forms of trafficking” in the TVPA, this section of the amendment would contain one major modification: the definition of coercion would be broadened explicitly to include psychological pressure.¹⁷⁴

Both offenses—human trafficking and aggravated human trafficking—would have the same subsection (4), explaining the conduct that constitutes exploitation. The language of subsection (4) is broader than the language in the TVPA because it includes “other forms of sexual exploitation” and “slavery or practices similar to slavery.”¹⁷⁵ This portion of the amendment is intended to be broadly inclusive to ensure that any form of exploitation is captured within the amendment’s prohibited conduct.¹⁷⁶

The proposed congressional UCMJ amendment would include the text of the punitive article, which would prohibit human trafficking in all its forms, but it would require an implementing instruction

¹⁷⁴ See *infra* Appendix B. Currently, the TVPA’s definition of “serious harm,” nested in its definition of “coercion,” contemplates that some forms of harm are psychological. See 18 U.S.C. § 1591(c)(2). However, as argued elsewhere in this Note, this definition wrongly assumes that the victim has the ability to consent up to the point where “serious harm” is inflicted upon him or her. See *supra* notes 82–86 and accompanying text.

¹⁷⁵ See *infra* Appendix A.

¹⁷⁶ The U.N. Model Law provides examples of other countries’ antitrafficking statutes, which include forced marriage and organ removal within their definitions of prohibited conduct. See MODEL LAW AGAINST TRAFFICKING IN PERSONS ch. V, §§ 1(c), 2(b) (United Nations Office on Drugs & Crime 2009), available at http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf. Rather than take the kitchen-sink approach, this proposed amendment would include the most common categories of exploitative conduct, but would be explicitly nonexclusive.

via an executive order¹⁷⁷ to prescribe, inter alia, maximum punishments for conviction.¹⁷⁸ Each of the maximum punishments would be tailored with reference to both the corresponding sections of the TVPA and similar offenses under the UCMJ, if applicable.

The maximum punishment for human trafficking for purposes of forced labor would be five years imprisonment. This punishment is based on and commensurate with the provision of the TVPA which describes “unlawful conduct” with respect to documents (i.e., passports) in furtherance of labor trafficking.¹⁷⁹

The maximum punishment for human trafficking for purposes of sexual exploitation would be ten years imprisonment. This punishment is based on the five-year maximum punishment under the UCMJ’s pandering and prostitution article,¹⁸⁰ and adds five additional years based on the TVPA’s punishment for unlawful conduct with respect to documents in furtherance of labor trafficking.¹⁸¹ This combination is necessary to reach both the pandering offense and the trafficking offense.

The maximum punishment for an aggravated human trafficking offense that does not include the serious injury or death of the victim, or a victim under the age of eighteen, would be twenty years imprisonment. This is based on similar provisions in the TVPA.¹⁸²

Finally, the maximum punishment for an aggravated human trafficking offense that involves either the serious injury or death of the exploited person, or a victim under the age of eighteen years, would be life imprisonment. This is also based on similar provisions in the TVPA.¹⁸³

¹⁷⁷ This executive order would amend the MCM and articulate the elements, define key terms, and set the maximum punishments authorized for each offense, as well as provide sample specifications to aid prosecutors in charging. See *infra* Appendix B.

¹⁷⁸ The MCM does not prescribe minimum punishments, only maximum. See *MANUAL FOR COURTS-MARTIAL UNITED STATES* pt. IV (2012).

¹⁷⁹ 18 U.S.C. § 1592(a). This provision of the TVPA encompasses conduct such as the destruction of passports or immigration documents. *Id.* The idea behind capping this section’s punishment at five years’ imprisonment is to get at conduct which does not rise to the level of force, fraud, or coercion, and is thus less morally culpable, but which nonetheless exploits the victim and results in an unacceptable condition of servitude.

¹⁸⁰ *MANUAL FOR COURTS-MARTIAL UNITED STATES* pt. IV, ¶ 97e(2).

¹⁸¹ 18 U.S.C. § 1592(a).

¹⁸² *Id.* § 1590.

¹⁸³ *Id.* §§ 1590, 1591(b).

2. *The Gaps Are Filled: Application of the Proposed Article*

With the new punitive article in mind, consider how the application of that punitive article would have changed the outcomes of scenarios presented at the beginning of this Note.

First, consider Faye. When a whistleblower in an American contracting company brought allegations of human trafficking to U.S. commanders in Kabul, the commanders would have initiated an investigation into several named employees.¹⁸⁴ Because the contracting company was accompanying the force in an area of contingency operations, the commander of the U.S. base in Kabul would have initiated the court-martial process. CID agents in Kabul would have been on the scene within seventy-two hours to investigate the crime, collect evidence, and interview witnesses. After an article 32 hearing, the investigating officer would have determined that there were sufficient grounds for the case to be referred to court-martial. Several employees would have been charged with aggravated human trafficking for purposes of sexual exploitation for subjecting women in the brothel to exploitation by means of fraud and psychological coercion. Before Faye was repatriated back to China, she would have testified at the court-martial of her American “owner.” He would have received a sentence of twelve years’ imprisonment.

Next, consider Vinnie. After the American reporter interviewed Vinnie and her coworkers in Iraq, the court-martial process would have been initiated against several employees of the AAFES subcontractor. Because the AAFES subcontractor was co-located on the base with the convening authority, CID agents would have been able to initiate the investigation within twenty-four hours. The employees would have been convicted of human trafficking for purposes of forced labor by means of abuse of power or a position of vulnerability. They would have received sentences ranging from six months’ to four years’ imprisonment.

IV. UNSATISFACTORY ALTERNATIVES: INTERNATIONAL LAW AND THE STATUS QUO

The above analysis sets out a comprehensive solution to the problem of contractor accountability for human trafficking committed while accompanying the Armed Forces in a declared war or contingency operation, but there are several counterarguments that might be

¹⁸⁴ This and the scenario that follows are hypothetical applications of this Note’s proposed article to the cases described in the Introduction.

raised by those who feel that a UCMJ-based solution would be inappropriate. Upon closer scrutiny, however, each of these counterarguments fails to persuade.

A. *Arguments for an Alternative Venue: Reliance on International or Host-Country Prosecution*

At least one scholar has proposed that human trafficking offenses should be prosecuted in the International Criminal Court (“ICC”) as a crime against humanity under article 7 of the Rome Statute.¹⁸⁵ Reliance on the ICC, however, would be misplaced in the context of trafficking offenses committed by U.S. nationals or non-nationals employed by the U.S. Government in an area of war or a contingency operation because the United States is not a party to the treaty that created the ICC and has adopted legal policies designed to ensure that the ICC cannot exercise jurisdiction over its nationals.¹⁸⁶ Thus, the use of the ICC in the context of civilian contractors is not a viable option.

Another unsatisfactory option for prosecution of civilian contractors who commit human trafficking offenses is relying on the host country to prosecute these claims. This approach, like reliance on the ICC, is problematic. For example, both Iraq and Afghanistan are on the State Department’s Tier 2 Watch List for failures to comply with minimum standards of antitrafficking enforcement.¹⁸⁷ Iraq has no antitrafficking law in place.¹⁸⁸ Afghanistan has yet to prosecute anyone under its 2008 antitrafficking law and has reportedly punished victims of sex trafficking with imprisonment for adultery or prostitution.¹⁸⁹ It is unrealistic to leave prosecutions in the hands of countries in conflict who lack the legal resources to effectively prosecute offenses. Even in

¹⁸⁵ Rome Statute of the International Criminal Court art 7, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). Article 7(1) provides that enslavement constitutes a crime against humanity when it is committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” See Kim, *supra* note 82, at 505 n.343. Article 7(2)(c) defines “enslavement” as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such powers in the course of trafficking in persons, in particular women and children.” See *id.*

¹⁸⁶ Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. INT’L. CRIM. JUST. 618, 618–19 (2003). These policies include restriction of cooperation with the ICC and states that are parties to the ICC, agreements with states that prohibit the transfer of U.S. nationals to the ICC, and the enactment of a U.N. Security Council Resolution preventing the ICC from exercising jurisdiction over the nationals of nonparties involved in U.N.-authorized operations. See *id.*

¹⁸⁷ 2011 TRAFFICKING IN PERSONS REP., *supra* note 1, at 51–52.

¹⁸⁸ *Id.* at 197.

¹⁸⁹ *Id.* at 63.

countries where sufficient legal resources exist, past experience shows that the host country may be reluctant or believe it lacks jurisdiction to prosecute offenders who are U.S. nationals.¹⁹⁰ Thus, reliance on the host nation to prosecute an individual accused of human trafficking is not a sufficient replacement for an amendment of the UCMJ.

B. Arguments Against Amending the UCMJ

Opponents to amending the UCMJ might point out that Congress, in choosing to focus the language of its 2005 UCMJ amendment on pandering and prostitution,¹⁹¹ has already rejected the idea of amending the UCMJ to make human trafficking a punishable offense.¹⁹² This argument is unpersuasive. The prostitution and pandering article was enacted in large part because of media attention on U.S. service members' patronage of Korean prostitutes who had been trafficked into the country.¹⁹³ The language of the punitive article, as enacted, was arguably sufficient to combat this kind of indirect support for human *sex* trafficking. As has been discussed elsewhere in this Note, however, human trafficking is a far broader problem, encompassing both sexual exploitation and forced labor.¹⁹⁴ The current punitive article does not go far enough to reach those who commit trafficking offenses because it fails to address labor trafficking offenses and its punishments are not commensurate with other U.S. antitrafficking laws.¹⁹⁵

Moreover, the mere fact that Congress failed to enact a more comprehensive UCMJ amendment in 2005 gives no basis to argue that the UCMJ need not be amended in 2012 and beyond. Although the prostitution and pandering article might have seemed a sufficient tool at the time of its enactment, subsequent allegations of civilian contractor misconduct without attendant prosecutions illustrate its shortcomings. A military prosecutor, for example, would be unable to use the current punitive article to prosecute the AAFES subcontractors involved in the trafficking and forced labor of women like Vinnie.¹⁹⁶

¹⁹⁰ See *supra* note 46 and accompanying text.

¹⁹¹ See *supra* Part II.C.2.

¹⁹² See Angela D. Giampolo, Note, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 TEMP. POL. & CIV. RTS. L. REV. 195, 214 (2006).

¹⁹³ See Jorene Soto, "We're Here to Protect Democracy. We're Not Here to Practice It:" *The U.S. Military's Involvement in Trafficking in Persons and Suggestions for the Future*, 13 CARDOZO J.L. & GENDER 561, 566–67 (2007).

¹⁹⁴ See *supra* notes 140–41 and accompanying text.

¹⁹⁵ See *supra* Part II.C.2.

¹⁹⁶ See *supra* Part II.C.2.

The current UCMJ article prohibiting pandering and prostitution is thus insufficient to support the United States' stated "zero-tolerance" policy on human trafficking.

A variation on this counterargument could be that if a UCMJ amendment is necessary, the UCMJ article should mirror the language in the TVPA. As this Note argues, however, the TVPA's definitions are overly restrictive and fail to account for trafficking offenses that exploit power or victims' positions of vulnerability.¹⁹⁷ Civilian contractors, particularly those who employ nationals from outside of the host nation, potentially wield a great deal of power over their employees. It is important for the proposed amendment's language to reach not only offenders who use traditional means of physical force and coercion, but also those whose means of exploitation are more insidious.

CONCLUSION

Due to the significant enforcement problems and gaps in current federal laws aimed at combating human trafficking, Congress should amend the UCMJ punitive articles to broadly prohibit any form of human trafficking. In doing so, Congress would finally bring its enacted legislation in line with the stated policy of the U.S. Government to combat human trafficking offenses committed by personnel accompanying the armed forces in areas of war or contingency operation. This proposed amendment would close the gaps in current federal law and ameliorate the motivational and evidentiary problems that inhibit effective prosecution of these offenses. Most important, this amendment would ensure that justice is done for victims like Faye and Vinnie. These victims deserve justice, and we deserve a system that would allow our government to live up to its stated ideals while it is engaged in military operations abroad.

¹⁹⁷ See *supra* notes 82–87 and accompanying text.

APPENDIX A: PROPOSED AMENDMENT

Military Human Trafficking Act of 2012

To amend Chapter 47 of Title 10, United States Code (the Uniform Code of Military Justice), to provide penalties for human trafficking. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE

This Act may be cited as the “Military Human Trafficking Act of 2012.”

SECTION 2. HUMAN TRAFFICKING

(a) *In General*—Chapter 47 of Title 10 of the United States Code is amended by adding the following new paragraph:

§ XXX. Art. XX. Human Trafficking

(a) Human Trafficking. Any person subject to this chapter who—

(1) recruits, transports, transfers, harbors or receives another person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of subparagraph (a);

(3) by means of deception, the abuse of power, a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;

(4) for the purposes of exploitation of that person, which for the purposes of this Act shall include, but is not limited to, exploitation of the prostitution of others or other forms of sexual exploitation, forced or coerced labor or services, slavery or practices similar to slavery such as debt bondage or serfdom, servitude, and other forms of exploitation defined in 22 U.S.C. § 7102, is guilty of human trafficking and shall be punished as a court-martial may direct.

(b) Aggravated Human Trafficking. Any person subject to this chapter who—

(1) recruits, transports, transfers, harbors or receives another person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of subparagraph (a);

(3) by means of force, threats of force, fraud, or coercion; or against a person who has not yet attained the age of eighteen (18) years; or caused serious bodily injury or death to an-

other person while engaged in an act described in violation of subparagraph (a);

(4) for the purposes of exploitation of that person, which for the purposes of this Act shall include, but is not limited to, exploitation of the prostitution of others or other forms of sexual exploitation, forced or coerced labor or services, slavery or practices similar to slavery such as debt bondage or serfdom, servitude and other forms of exploitation defined in 22 U.S.C. § 7102, is guilty of aggravated human trafficking and shall be punished as a court-martial may direct.

SECTION 3. EFFECTIVE DATE

This Act shall take effect on ____ 2012. Nothing contained in this Act shall be construed to make punishable any act of commission or omission prior to ____ 2012, which was not punishable when committed or omitted.

APPENDIX B: PROPOSED EXECUTIVE ORDER

Executive Order XXXXX
2012 Amendments to the Manual for Courts-Martial,
United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of Title 10, United States Code, Uniform Code of Military Justice, 10 U.S.C. §§ 801–946, in order to prescribe amendments to the Manual for Courts-Martial United States, 2012, it is hereby ordered as follows:

Section 1. Part IV of the Manual for Courts-Martial United States, 2012, is amended as follows:

(a) The following new paragraph is inserted after paragraph XX:

XX. Article XX—Human Trafficking

a. *Text of Statute*

(a) Human Trafficking. Any person subject to this chapter who—

(1) recruits, transports, transfers, harbors or receives another person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of subparagraph (a);

(3) by means of deception, of the abuse of power or abuse of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;

(4) for the purposes of exploitation of that person, which for the purposes of this Act shall include, but is not limited to, exploitation of the prostitution of others or other forms of sexual exploitation, forced or coerced labor or services, slavery or practices similar to slavery such as debt bondage or serfdom, servitude, and other forms of exploitation defined in 22 U.S.C. § 7102, is guilty of human trafficking and shall be punished as a court-martial may direct.

(b) Aggravated Human Trafficking. Any person subject to this chapter who—

(1) recruits, transports, transfers, harbors or receives another person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of subparagraph (a);

(3) by means of force, threats of force, fraud, or coercion; or against a person who has not yet attained the age of eighteen (18) years; or caused serious bodily injury or death to an-

other person while engaged in an act described in violation of subparagraph (a);

(4) for the purposes of exploitation of that person, which for the purposes of this Act shall include, but is not limited to, exploitation of the prostitution of others or other forms of sexual exploitation, forced or coerced labor or services, slavery or practices similar to slavery such as debt bondage or serfdom, servitude, and other forms of exploitation defined in 22 U.S.C. § 7102, is guilty of aggravated human trafficking and shall be punished as a court-martial may direct.

b. Elements.

(1) Human Trafficking.

(a) That the accused took action or benefitted financially or otherwise from another's action; and

(b) that the action caused, by means of deception, the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, another person to be exploited.

(2) Aggravated Human Trafficking.

(a) That the accused took action or benefitted financially or otherwise from another's action; and

(b) that the action caused, by means of force, threats of force, fraud, or coercion, another person to be exploited; or

(c) that the action caused another person to be exploited who had not yet attained the age of eighteen (18); or

(d) that the action caused the serious bodily injury or death of the exploited person.

c. Definitions.

(1) "Abuse of power or a position of vulnerability" shall mean such abuse that the person believes he or she has no reasonable alternative but to submit to the labor or services demanded, and includes, but is not limited to, taking advantage of vulnerabilities resulting from illegal entry into the country, a lack of proper documentation, pregnancy or any physical or mental disease or disability, including substance addiction, or reduced capacity to form judgments by virtue of infirmity, a physical or mental disability, or minority.

(2) "Coercion" shall mean use of force or threats of force, and some forms of nonviolent or psychological use of force or threats, including: threats of harm or physical restraint of any person; any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;

abuse or any threat linked to the legal status of a person; or psychological pressure.

(3) “Debt bondage” shall mean the status or condition arising from a pledge by a debtor of his or her personal services or those of a person under his or her control as security for a debt, if the value of those services is not applied towards the liquidation of the debt or if the length of those services is not limited and defined.

(4) “Deception” shall mean any conduct that is intended to deceive a person as to the nature of work or services to be provided, the conditions of work, the extent to which the person will be free to leave his or her place of residence, or other circumstances involving the exploitation of the person.

(5) “Forced labor or services” shall mean the condition of a person who provides labor or services, other than sexual services, and who, because of the use of threats of physical, sexual, or financial harm, physical restraint, abuse of the legal process, debt bondage, retention of passport or identity papers, is not free to cease providing labor or services, or is not free to leave the place or area where the labor or services are provided.

(6) “Sexual exploitation” shall mean the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude, or other kinds of sexual services, including pornographic acts or the production of pornographic materials.

d. Lesser-Included Offenses. Article 80–Attempts.

e. Maximum Punishment.

(1) *Human trafficking for purposes of forced labor or peonage.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five (5) years.

(2) *Human trafficking for purposes of sexual exploitation.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten (10) years.

(3) *An aggravated human trafficking offense which does not involve the serious injury or death of the exploited person or a victim under the age of eighteen (18) years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for twenty (20) years.

(4) *An aggravated human trafficking offense which involves either the serious injury or death or the exploited person or a victim under the age of eighteen (18) years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

f. Sample Specifications.

(1) *Human Trafficking.* In that _____ (personal jurisdiction data), did (at/on board—location), on or about ___ 20___, by means of (deception)(the abuse of power or of a position of vulnerability)(of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person), did (recruit)(transport)(transfer)(harbor) (receive)(obtain a financial benefit from) _____ for purposes of (sexual exploitation)(forced labor or involuntary servitude).

(2) *Aggravated Human Trafficking.* In that _____ (personal jurisdiction data), did (at/on board — location), on or about ___ 20___, (by means of force, threat of force, fraud, or coercion)(with a child under the age of eighteen (18) years)(cause the death or serious bodily injury of _____ while, did (recruit)(transport)(transfer)(harbor)(receive)(obtain a financial benefit from) _____ for purposes of (sexual exploitation)(forced labor or involuntary servitude).

Section 2. These amendments shall take effect on January XX, 20XX. Nothing contained in this amendment shall be construed to make punishable any act of commission or omission prior to January XX, 20XX, which was not punishable when committed or omitted.

Section 3. The Secretary of Defense, on behalf of the President, shall transmit a copy of this order to the Congress of the United States in accord with section 836 of Title 10 of the United States Code.